INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute and Treaty involved	2
Questions presented	4
Statement	5
Specification of errors to be urged	6
Reasons for granting the writ	7

CITATIONS

Cases:	
Chemische Fabrik Von Heyden v. *Tait*, 64 F. (2d) 295	11, 12
District of Columbia v. *Eslin*, 183 U. S. 62	8
Hart v. *United States*, 118 U. S. 62	9
Kogler v. *Miller*, 288 Fed. 806	9
United States v. *Chemical Foundation*, 272 U. S. 1	9, 10, 11
United States v. *Realty Co.*, 163 U. S. 427	10
Woodson v. *Deutsche Gold, etc., Vornals*, 292 U. S. 449	9, 11, 12
Statutes:	
Public Resolution No. 53, 73d Cong. (c. 851, 48 Stat. 1267, 1268, 1269)	2
Treaty:	
Treaty of Berlin, 42 Stat. 1939, reprinted, in Sen. Doc. No. 348, 67th Cong., 4th Sess	3

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, PETITIONERS

v.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General on behalf of Homer S. Cummings, Attorney General of the United States, as successor in interest to the Alien Property Custodian and W. A. Julian, as Treasurer of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above case.

OPINIONS BELOW

The memorandum opinion of the Supreme Court of the District of Columbia is not reported (R. 8).

The opinion of the United States Court of Appeals for the District of Columbia, per Groner, J. (R. 13), and the subsequent *per curiam* opinion on motion for rehearing (R. 26) are reported in 83 F. (2d) 554, 562.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia was rendered February 17, 1936. On motion for rehearing a *per curiam* opinion was rendered on May 4, 1936. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE AND TREATY INVOLVED

Public Resolution No. 53, 73rd Congress (c. 851, 48 Stat. 1267, 1268, 1269), provides in part as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That so long as Germany is in arrears in any payments of principal or interest, * * * under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues,

> profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved. * * * *Provided, further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution.

The Treaty of Berlin (42 Stat. 1939) incorporated by reference certain provisions of the Treaty of Versailles, including, *inter alia,* paragraph (d) of Article 297, Section IV, Part X and paragraph 3 of the Annex to Section IV, Part X, as follows (reprinted in Senate Document No. 348, 67th Cong. 4th Sess.):

> As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty. * * *

In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

QUESTIONS PRESENTED

1. Whether the District Court of the United States for the District of Columbia, after the enactment of Public Resolution No. 53, 73d Congress, has jurisdiction to entertain a suit by a German corporation to compel the return of enemy property and moneys seized by the United States under

the Trading with the Enemy Act, the President not having removed the restrictions as to German corporations.

2. Whether the provisions of the Treaty of Berlin preclude a corporation organized and existing under the laws of Germany from questioning the validity of Public Resolution No. 53, and the detention of property ordered by that resolution.

3. Whether a German corporation having filed a claim under the Settlement of War Claims Act of 1928, acquired vested property rights in property held by the United States under the Trading with the Enemy Act, and if so, whether Public Resolution No. 53 deprives it of such vested property rights without due process of law or takes its property for public use without just compensation, in violation of the Fifth Amendment.

STATEMENT

Under the Trading with the Enemy Act the Alien Property Custodian seized property of a German enemy corporation. (R. 3.) The Deutsche Bank und Disconto-Gesellschaft, the successor of said corporation filed, under the Settlement of War Claims Act of 1928, a notice of claim for the return of 80% of the property so seized, and made application to the President for the return thereof. As delegate of the President, the Alien Property Custodian determined that the claimant was the owner of the property and entitled to its return. (R. 3.) Thereafter, certain third parties brought an attachment proceeding, under the pro-

visions of the Trading with the Enemy Act, in which they claimed rights in this property. (R. 3, 4.) This attachment proceeding was dismissed on May 24, 1934. (R. 4.) On June 27, 1934, the President approved Public Resolution No. 53, which, after reciting Germany's default upon its obligations under the Debt Funding Agreement of 1930, postponed all returns and payments formerly authorized by the Trading with the Enemy Act and by the Settlement of War Claims Act of 1928.

On October 3, 1934, suit was instituted by the Deutsche Bank und Disconto-Gesellschaft, in the Supreme Court of the District of Columbia, against Homer S. Cummings, Attorney General of the United States and W. A. Julian, as Treasurer of the United States, to compel the return of the aforesaid property. (R. 2.) The petitioners filed a motion to dismiss the bill of complaint (R. 7) and this motion was sustained (R. 8). On appeal to the Court of Appeals for the District of Columbia the action of the Supreme Court of the District of Columbia was on February 17, 1936, reversed. On motion for rehearing the Court of Appeals on May 4, 1936, adhered to its prior decision.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that Public Resolution No. 53, 73d Congress, did not withdraw the consent of the United States to be sued by a German corporation

under the Trading with the Enemy Act as amended, for the return of enemy property.

2. In failing to hold that the Deutsche Bank und Disconto-Gesellschaft, as a German corporation, is precluded by the Treaty of Berlin, from questioning the validity of Public Resolution No. 53, and the detention of property directed by that resolution.

3. In holding that the Deutsche Bank und Disconto-Gesellschaft, having filed a claim under the Settlement of War Claims Act of 1928, acquired vested property rights in property held by the United States under the Trading with the Enemy Act, and, therefore, that with respect to said corporation, Public Resolution No. 53 is unconstitutional.

4. In reversing the judgment of the Supreme Court of the District of Columbia.

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals for the District of Columbia has passed upon questions of substance relating to the application of the Constitution, and the construction and application of various treaties and statutes of the United States; questions which, in the particular aspects involved, have not been but should be settled by this Court.

The court below held that Public Resolution No. 53 did not remove its jurisdiction to entertain a suit by a German corporation for the return of property seized under the Trading with the Enemy

Act. This conclusion was reached despite the fact that Public Resolution No. 53 provided that "all payments * * * authorized or directed to be made under the Trading with the Enemy Act * * * *whether or not a judgment or decree has been entered with respect thereto,* shall be postponed and the money or property * * * reserved." That this enactment destroyed the lower court's jurisdiction to entertain the suit is a proposition that seems to follow from a consideration of this Court's opinion in *District of Columbia* v. *Eslin,* 183 U. S. 62, 64, 65, wherein it was said:

> The present cases were brought under the act of 1895, and were determined with reference to its provisions. In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, *and the express prohibition of the payment of judgments theretofore rendered,* any declaration by this court as to the correctness of the final judgment entered by the Court of Claims under the act of 1895 would be useless for every practical or legal purpose, and would not be in the exercise of judicial power within the meaning of the Constitution. It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the

> process of any court to make such payment in violation of the act of 1897. * * * It seems therefore clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties. [Italics supplied.]

See also *Hart* v. *United States,* 118 U. S. 62.

The Court of Appeals also held that the Congress in 1934 was without the constitutional power to retain and to withhold from German claimants property which had been lawfully seized under the Trading with the Enemy Act and which still remained in the possession of the United States; that the war power of Congress with respect to such property was exhausted after the enactment of the Settlement of War Claims Act of 1928. This Court has had frequent occasion to examine the Trading with the Enemy Act, as amended, and has always indicated that Congress retained dominion over all enemy property. See *United States* v. *Chemical Foundation,* 272 U. S. 1; *Woodson* v. *Deutsche Gold, etc., Vormals,* 292 U. S. 449. The opportunity which Congress afforded former enemies to assert an interest in seized property was more in the nature of a privilege than a right. But whether a right or a privilege it was created and conferred by Congress and continued only by its grace. See *Kogler* v. *Miller,* 288 Fed. 806 (C. C. A. 3rd).

The argument of the lower court that *United States* v. *Realty Co.*, 163 U. S. 427, was a precedent for payment of money, after repeal of authority to pay, is erroneous. A new Act was passed authorizing payment, after the repeal.

It is also to be noted that the court below gave no consideration to the Treaty of Berlin and the provisions of the Treaty of Versailles, incorporated therein. An examination of these treaties indicates that German Nationals were thereby precluded from challenging measures theretofore or thereafter enacted by Congress with regard to property seized under the Trading with the Enemy Act. It is submitted that Public Resolution 53 falls within the scope and terms of these treaty provisions; and therefore the suit herein is directly affected by these treaties. Cf. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11.

(2) The decision of the court is based upon certain legal conclusions which are in conflict with the applicable decisions of this and other courts. Thus at the close of the opinion rendered on February 17, 1936, the court in a seriatim statement concluded in part as follows:

> We are, therefore, of the opinion * * * Fifth, that the War Claims Act recognizes the *beneficial title of appellant to the property;* and that Congress had power, in the recognition of this right, to order restoration of the property; *and that in such action*

the element of gratuity was wholly lacking: [Italics supplied.]

Sixth, that the Act restoring the property established a vested right in appellant which is not affected by the subsequent passage of Public Resolution Number 53 * * *

That former enemy owners were divested of every right in respect to property taken and held under the Trading with the Enemy Act, and that the return of this property was purely an act of grace, are principles which, prior to the decision of the Court of Appeals for the District of Columbia, were deemed indisputably established by the decisions of this and other courts: *United States* v. *Chemical Foundation,* 272 U. S. 1; *Woodson* v. *Deutsche, etc., Vormals,* 292 U. S. 449; *Chemische Fabrik Von Heyden* v. *Tait,* 64 F. (2d) 295 (C. C. A. 4th).

In the *Chemical Foundation* case it was said (page 11):

> There is no support for a construction that would restrain the force of the broad language used. Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners . . . And the Act makes no provision for compensation . . . The provision that, after the war, enemy claims shall be settled as Congress shall direct conferred no rights upon such owners.

In the *Woodson* v. *Deutsche, etc., Vormals* case (pages 453 and 454) it was said:

> The Trading with the Enemy Act was passed by Congress in the exertion of the war power; its purpose was to weaken enemies by diminishing the sources from which they could obtain aid, and to strengthen this country by adding to resources for the successful prosecution of the war. Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct." 40 Stat. 424. While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during *and after* the war. *It is clear the enemy owners were divested of every right in respect of property taken and held under the Act. United States* v. *Chemical Foundation,* 272 U. S. 1, 9–11. [Italics supplied.]

In *Chemische Fabrik Von Heyden* v. *Tait,* 64 F. (2d) 295, 296 (C. C. A. 4th), the court quoted with approval the language of the lower court as follows:

> In the view I take of the matter the dominant and controlling consideration is that

> *the "Settlement of War Claims Act" was an act of grace* of the sovereign United States, and in returning the property this Government undoubtedly had the clear right to impose such terms and conditions as it pleased Congress to enact. The property could have been withheld entirely or confiscated beyond any legal right or remedy of the plaintiff. [Italics supplied.]

(3) The lower court recognized the importance of the matter at bar and stated in a brief one-sentence paragraph: "The question is of great importance." This importance lies not only in the fact that the future administration by the United States of property seized and held under the Trading with the Enemy Act will be controlled, in large measure, by the decision in this case, but also because the case involves questions affecting the power of Congress to act with respect to international relations and inter-governmental obligations.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1936.

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